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No. 81-2378

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

YACHTS AMERICA, INC., and
THOMAS BRUCE WILSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether an equitable owner of real property in possession of same, who has properly exercised an option to purchase the property, and who has initiated an equity action in state court to compel the conveyance of record title, is entitled to just compensation for that interest when during his equity action the state court is denied jurisdiction to convey the property as a consequence of a federal legislative taking pursuant to Pub. L. No. 93-444, 88 Stat. 1304 (1974).

2. Whether the United States can ignore the Fifth Amendment of the Constitution and the requirements of Pub. L. No. 93-444, 88 Stat. 1304 (1974), to pay just compensation to the "owners" of real property taken by the United States and knowingly ignore its own rules and regulations requiring it to take into account the interests in real property of lessees, contract purchasers and lessees with options to purchase other than those of the record owner, and thereafter raise as a defense the doctrine of collateral estoppel where:

   (1) the state court lost its jurisdiction to provide a remedy in the state action prior to the entry of judgment, or

   (2) a Consent Decree was entered into with an assignment granting the claimant all of the rights in the property of the record owner.

3. Whether Pub. L. No. 93-444, 88 Stat. 1304 (1974), granted the "operator" a compensable right to an "orderly termination" and whether this right was taken by the actions and inaction of the United States and by Pub. L. No. 94-578, 90 Stat. 2732 (1976).

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YACHTS AMERICA, INC., and
THOMAS BRUCE WILSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners, Yachts America, Inc. and Thomas Bruce Wilson, (hereinafter petitioners) respectfully request that this Court issue a Writ of Certiorari to the United States Court of Claims to review and reverse a decision by that Court entered on February 24, 1982, granting summary judgment to the respondent on part of Count I and of Count III of petitioners claims filed below.

OPINIONS BELOW

The decision of the Court of Claims is reproduced as Appendix B, and is reported as *Yachts America, Inc.* v. *United States*, 673 F.2d 356 (1982). The Consent Decree of the Circuit Court of Prince George's County, Maryland, Equity No. D-8967, is reproduced as Appendix C and is not reported. The Opinion and Order of the Circuit Court for Prince George's County, Maryland, Law No.

56019 is reproduced as Appendix E and the Order of the Circuit Court for Prince George's County, Maryland, incorporating the Opinion and Order into Equity No. D-8967 is reproduced as Appendix F; these orders are not reported. The Order of the Court of Claims denying the petitioners' Motion for Rehearing is reproduced as Appendix G and is not yet reported.

JURISDICTION

The Opinion and Order of the Court of Claims was made on February 24, 1982. On March 10, 1982, the petitioners filed a Motion for Rehearing which was denied on April 2, 1982. This Petition is filed within ninety (90) days of the denial of rehearing. Petitioners seek to invoke the Court's jurisdiction under 28 U.S.C. § 1255(1).

STATUTES AND REGULATIONS INVOLVED

This case involves a legislative taking of property and the right to an "orderly termination" pursuant to Pub. L. No. 93-444, 88 Stat. 1304 (1974), as amended by Sec. 305, Pub. L. No. 94-578, 90 Stat. 2732 (1976), both reproduced here in Appendix A. A portion of the *Procedural Guide for the Acquisition of Real Property by Governmental Agencies*, Department of Justice, Land and National Resources Division (1972) together with a Memorandum of the Department of Interior, National Park Service relating to procedures for the acquisition of real property, dated February 15, 1980 are also reproduced in Appendix A. Also involved is that portion of the United States Constitution, Amendment V regarding the taking of property without just compensation set forth below:

> ". . . nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Count I—Ownership Claim

In 1972, the petitioners entered into a lease agreement for the Fort Washington Marina (hereinafter Marina), providing that the petitioners have an option to purchase the Marina. The petitioners, thereafter, occupied as a residence and operated the business of the Marina and continue to do so to the date of the filing of this Petition.

Because of disputes between the petitioners and their landlord (known as Fort Washington Marina, Inc., and hereinafter landlord), petitioners on November 30, 1973, sued the landlord for damages at law in the Circuit Court for Prince George's County, Maryland, resulting from the landlord's breach of the lease agreement. (This case was known as Law No. 56019 in the Circuit Court for Prince George's County, Maryland, and also known as Law No. 5665 in the Circuit Court for St. Mary's County, Maryland, to which the case was removed during litigation.)

Subsequently, on July 20, 1974, the petitioners properly exercised their option to purchase the Marina, but the landlord refused to convey the Marina to the petitioners pursuant to the terms of said option. Petitioners timely filed a suit in equity to require specific performance of the option to purchase and to require the landlord to convey the Marina to petitioners. That case was known as Equity No. D-8967 in the Circuit Court for Prince George's County, Maryland. In the State of Maryland, the Circuit Court has general jurisdiction and is divided into a Law Court and an Equity Court.

After the petitioners filed the specific performance equity action, Pub. L. No. 93-444, *supra*, was enacted on October 15, 1974; Parcel D referred to therein is the

Marina. This law provided that "the United States will pay just compensation to the owners of any property taken pursuant to this subsection," *ibid.*, and provided a period of one (1) year within which the Department of Interior could negotiate with the "owners" just compensation of the property taken and before it could initiate any action in Court. The law further provided the Secretary of the Interior "shall allow for the orderly termination of all operations on real property acquired by the United States in Parcels A, B, C and D of this subsection and for the removal of equipment, facilities and personal property therefrom." *ibid.*

The Marshall Hall Amusement Park, (hereinafter Marshall Hall) was another parcel acquired under the same law, Pub. L. No. 93-444, *supra*. The owner of Marshall Hall was Star Enterprises Ltd., (hereinafter Star) a corporation whose stock was owned by Joseph Goldstein, and which corporation owned Fort Washington Marina, Inc., the landlord, and was the entity that held title of record to the Marina.

On October 28, 1974, within two weeks after the passage of this law, petitioners gave written notice to the Associate Director and oral notice to the Director of National Capital Parks, a division of the National Park Service and of the Department of the Interior of the United States, (hereinafter collectively referred to as NPS) at a meeting, as follows: (a) that the petitioners had exercised their option to purchase the Marina; (b) that the owner of record of the Marina had refused to convey the same to the petitioners; (c) that the petitioners had at that time an equity action pending for specific performance of that option to purchase; and (d) that the petitioners were the equitable owners of the Marina and entitled to receive

any monies which the United States may pay for such property. Further, at that time the Associate Director was given copies of all relevant court proceedings.

On February 14, 1975, NPS notified Goldstein of the sums the United States had determined constituted just compensation for the Marina and for Marshall Hall, and offered to pay those funds to Goldstein. Goldstein (or his company, Star) supplied an independent appraisal for Marshall Hall showing a higher value than the government had offered but submitted no independent appraisal for the Marina.

On June 16, 1975, Goldstein met with employees of NPS representing the United States to negotiate the final agreement for the payment of just compensation for the Marina and Marshall Hall. At that time, NPS offered Mr. Goldstein $800,000.00 for the Marina, which NPS had appraised for $750,000.00, and $3,218,500.00 for Marshall Hall, which NPS had appraised at $2,000,000.00. Goldstein surprisingly suggested that the price for the Marina should be *reduced* by $50,000.00 to $750,000.00 and that the price for Marshall Hall should be increased by $100,000.00 to $3,318,500.00.

NPS agreed to this unusual modification and eventually paid to or on behalf of Goldstein or his companies the NPS appraised value of the Marina, exactly, and paid *one hundred sixty-five percent (165%)* of the NPS appraised value for Marshall Hall. On or about June 16, 1975, NPS entered into a Settlement Agreement with Goldstein's companies with regard to the payment of just compensation for the Marina and Marshall Hall. Petitioners were never contacted, never negotiated with and never given any knowledge of this agreement by NPS or by any other party prior to the execution thereof.

The agreement by its terms was contingent upon the outcome of the litigation between petitioners and the landlord, and as depositions below show it contained warranties that NPS knew to be false. On or about June 19, 1975, petitioners learned of the agreement.

Petitioners had no knowledge that NPS considered the said agreement as anything more than an executory, contingent agreement designed to remove the owner of record as a participant from any future negotiations for just compensation for the payment for the Marina.

Other than as set forth above, from October 14, 1974, the date of the enactment of Pub. L. No. 93-444, *supra*, taking the property, through and including October 8, 1975, the petitioners had no communications concerning or knowledge of any negotiations, settlements, or the payment of any compensation for the taking of the Marina or of any interest therein.

On or about June 26, 1975, without the knowledge of the petitioners, NPS, using Chicago Title Insurance Company (hereinafter Chicago Title) as settling agent, paid $750,000.00 for the Marina pursuant to its agreement with Goldstein. The petitioners received none of these funds and have received no other compensation for the taking of the Marina.

On September 18, 1975, the Circuit Court for Prince George's County, Maryland, in Law Case No. 56019, ruled that the petitioners here and plaintiffs in that case properly exercised their option to purchase the Marina. App. E, *infra*, at 34a. The Order further stated that the petitioners had

> "substantially complied with all of the terms of the Lease Agreement and was (sic) ready, willing and able to exercise the option to purchase, but that the

> Marina (landlord) never attempted to settle on the contract to purchase agreed to between the parties . . . if Marina (landlord) had acted as it should have when notified of Yachts (petitioners) intention to exercise its option, settlement could have been made between the parties prior to the time that the United States Government, by legislation, acquired title to the property. . . . Accordingly, the Court finds that there is no dispute as to any material fact and that the petitioners are entitled to a Summary Judgment in the Law case as to the issue of liability. In the Equity case, since the United States Government now owns the property, it is impossible for Marina (landlord) to specifically perform. It would, therefore, seem that the only remaining issue between the parties could be tried before a jury, as prayed for." Appendix E, *infra*, at 35a.

The Judge was sitting in both the Law and Equity cases, and this opinion and order was adopted in the Equity case. Appendix F, *infra*, at 37a. The reference to a trial by jury was in the Law case. In Maryland, juries do not sit in Equity cases.

The Court in its ruling found that petitioners herein had done everything required of them to vest equitable title in them, but that the Circuit Court of Maryland was without the power to vest legal title in petitioners as the United States had taken title to the property.

On September 25, 1975, petitioners forwarded to NPS a copy of the order, and demanded that the United States negotiated with the petitioners just compensation for their interest in the Marina. NPS did not respond to the request of petitioners. On October 4, 1975, petitioners requested that NPS respond to their demand in the letter of September 25, 1975. NPS did not respond to this request and never negotiated with the petitioners with

regard to payment of any compensation for their interest in the Marina.

On October 8, 1975, petitioners entered into an agreement resolving their disputes with the landlord, by taking a Consent Decree in the Equity case (App. C, *infra*, at 27a) *and by accepting an assignment from the landlord* (App D, *infra*, at 29a) of "any and all interest it may have" had remaining in the Marina as of the enactment of Pub. L. No. 93-444, *supra*, on October 15, 1975, and in which assignment the landlord warranted that other than the interest that it lost in the Marina by virtue of the taking by the United States on October 15, 1974, by that law, it had not subsequently "divested itself of any other interest in the subject real property" (i.e. the proceeds). Prior to October 28, 1975, petitioners informed NPS of the resolution of the litigation with the landlord.

The Consent Decree provided for damages, but the record below shows that landlord was known to be insolvent at that time and no monies have ever been recovered thereon and that these were damages as a consequence of the law action (breach of lease and not specific performance). The Consent Decree further provided as follows:

> "ORDERED, that specific performance as prayed for by the Plaintiffs, YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, be, and the same is hereby denied since it is no longer an available remedy because the United States of America took title of the subject property from FORT WASHINGTON MARINA, INC., on the 15th day of October, 1974, by public law number 93-444; and it is further . . .
>
> "ORDERED, that all other claims, counts, counter-claims, and/or all other issues of any nature

whatsoever, be, and the same are hereby dismissed with prejudice." App. C, *infra*, at 27a.

After this time, NPS never attempted to negotiate with the petitioners for any interest the petitioners may have had in the Marina.

Since the time of the passage of Pub. L. No. 93-444, *supra*, October 15, 1974, during 1975 and thereafter, it was, and continues to be, the "prescribed procedure that if someone other than the record owner is in possession of a tract being acquired by NPS that his rights be ascertained and that a disclaimer be obtained." Appendix A, *infra*, at 4a and at 8a. Further all times it was the procedure of NPS that

> "In addition to ordinary lease situations, those involving occupance or possible adverse possession, those involving the contract/seller purchaser relationship, those involving rights of first refusal to purchase, and those involving leases with options to purchase are instances when account needs to be taken of interests possible adverse to those of the record owner." App. A, *infra*, at 8a.

Depositions below show that NPS violated its own rules by not investigating and negotiating with a party in possession of real estate who is not the record owner. NPS wrongfully determined that it could rely on the "commitment to insure" of Chicago Title on the basis that the insurance company would protect the interests of the United States in this matter and as a consequence *ignored* the petitioners' rights, and did not negotiate with the petitioners or institute legal action of any sort to determine what, if any, just compensation was due to the petitioners as claimants of an interest in the Marina.

Mr. John P. Cooney, Manager of the Washington regional office of Chicago Title at the time of the issuance of

the aforementioned commitment to insure, in deposition, stated that the litigation between the petitioners and the landlord should have appeared as an exception on the said commitment to insure, and further stated that *NPS had actual knowledge* of this particular defect as it was *NPS which notified* Chicago Title of the defect on or about March 31, 1975.

Depositions below show that NPS would not have settled with the landlord if Chicago Title had reflected, on its commitment to insure, the litigation between your petitioners and the landlord for specific performance to convey title to the Marina then pending in the state court.

Count III—Orderly Termination Clause

Petitioners made continuing requests of NPS to be granted a permit or agreement of some sort under which they might be able to avail themselves of an "orderly termination" of their operations at the Marina and the removal of their equipment, facilities and personal property therefrom in accordance with Pub. L. No. 93-444, *supra*. Through December 9, 1975, for more than one year after the taking, NPS made no offer of a permit or agreement for "orderly termination". On December 10, 1975, NPS offered petitioners a letter agreement purporting to permit them to continue as the operator of the Marina for the purposes of an "orderly termination" of their operations and for the removal of equipment, facilities and personal property. The offer states the petitioners were entitled to continued operations in order to provide for an "orderly termination" of operations in the same manner as Pub. L. No. 93-444, *supra*, was being applied to Marshall Hall.

This offer was unacceptable to petitioners, as it did not provide for an orderly termination of the petitioners'

operations as provided for Marshall Hall for the following reasons: (a) paragraph 3 of the agreement required petitioners provide all necessary maintenance and repairs to "such government facilities identified herein . . . with standards acceptable to National Capital Park Service or as directed by the Superintendent, National Capital Parks—East, and the operator further agrees to carry such maintenance to completion," without any limitation on the amount or type of work which might have to be performed or the standards of repair which might have to be met; (b) paragraph 12 provided that any capital improvements made by the petitioners would have to "be amortized through the agreement period;" (c) paragraph 7 provided "all rates and prices charged to the public by the operator shall be subject to the approval by the Superintendent;" (d) paragraph 19 provided that the agreement may be *"terminated upon 30 days notice by"* NPS.

This agreement was significantly inferior to the agreement NPS made with Goldstein relating to Marshall Hall. Goldstein, owner of Star, or his attorney, was frequently in contact with NPS regarding negotiations for payment for Marshall Hall, the Marina, and personal property at the Marina. On February 26, 1975, more than nine months before NPS made any offer to the petitioners for orderly termination of operations at the Marina, NPS offered to Star an agreement for the operation of Marshall Hall pursuant to the same "orderly termination" of operations provision of Pub. L. No. 93-444, *supra*. This offer did not include the objectionable paragraphs later required of the petitioners; in particular it did not contain the following provisions:

(1) a requirement of maintenance and repairs to the facilities "in accordance with the standards acceptable to the National Park Service or as directed by the Superintendent, National Capi-

tal Parks—East" but rather provided "an ordinary wear and tear accepted" standard of maintenance;

(2) a requirement that any improvements or repairs should "be amortized through the agreement period;"

(3) a requirement for control of prices or rates charged by Star, but rather permitted Star to set its own prices;

(4) a provision for termination upon 30 days notice, but was in fact made for a full five-year term through December 31, 1979.

This offer was accepted by Star for the operation of Marshall Hall on March 3, 1975.

NPS maintained that, based upon petitioners' refusal to sign the tendered agreement for reasons stated to NPS verbally, the said agreement was withdrawn by NPS on September 21, 1976, and that a subsequent letter by petitioners conditionally accepting the said agreement was not an effective acceptance. Pub. L. No. 94-578, *supra*, was enacted October 21, 1976, and modified Pub. L. No. 93-444, *supra*, by deleting Parcel D from the aforementioned "orderly termination" clause and stating that the Marina operations were not to terminate.

Depositions below show that prior to the enactment of the amendment, NPS considered the Marina subject to the "orderly termination" provisions of the first law and that termination had to be completed by December 31, 1979. After enactment of the amendment, NPS took the position that the "operators" and the operations at the Marina were not entitled to an "orderly termination" of operations on property acquired by the United States and for the removal of equipment, facilities and personal property therefrom" but rather were *tenants at sufferance.*

NPS has made no offers to the petitioners for the operation of or for the "orderly termination" of its operations at the Marina since the first offer was withdrawn on September 21, 1976, and through the date of the filing of this Petition.

During the period from October 15, 1974, through December 31, 1979, NPS made repeated demands of petitioners to make repairs and perform maintenance on the property of the Marina and has exercised dominion over the property by ordering the petitioners to cease and desist certain acts which did not involve waste of the property or safety, but were purely business considerations, and on other occasions insisted that the petitioners conform to NPS concessionaires' standards. NPS has never treated the petitioners as its concessionaires except to maintain dominion and control of the property. In none of the demands made for repairs and maintenance were the petitioners ever offered compensation by NPS for any of the work or services demanded.

The failure of the United States to provide a permit or agreement for the petitioners to have an "orderly termination" of their operations at the Marina or to otherwise provide for an "orderly termination" constituted a taking of the petitioners' property in that: (a) the petitioners' lessees on the premises could not continue the operation of their businesses without some assurance of the term during which they would be able to continue their businesses and they therefore quit the premises; (b) the petitioners could not hire or keep skilled employees because they could not assure continued employment for any period of time; (c) petitioners could not obtain financing required to operate their businesses located at the Marina because of their tenuous status at the Marina; (d) because of the inability to hire skilled employees, and the inability of the petitioners to obtain financing in such a

tenuous setting, the businesses of the petitioners and of the tenants were forced to close, or substantially reduce their operations; (e) because of NPS' public position that the status of the petitioners' occupation of the Marina was questionable, the petitioners could not risk making any significant improvements or repairs to the property, as they had no assurance that they would be reimbursed for the same or permitted to use the same for any definite period of time; (f) the petitioners had to operate their businesses at the Marina without the knowledge of what obligations NPS may assert in the future regarding their occupation and without knowing who (the petitioners or NPS) was responsible for the maintenance and operation of the Marina; and (g) NPS employees had conferences with at least one of the petitioners' tenants regarding that tenant's lease with petitioners. NPS informed the tenant that the petitioners had no contract or permit to operate the Marina and that the petitioners were tenants at sufferance and might be removed at any time. Further, this tenant was informed that, after a development plan which was in progress was approved, the building which the tenant occupied would probably be removed from the premises of the Marina.

As a direct consequence of the statements of the representatives of NPS set forth above, Safford Marine, Inc., said tenant, vacated the premises, breaching its lease agreement by failing to pay rent, and did not exercise its option to stay on in the premises as a tenant of the petitioners.

THE COURT OF CLAIMS DECISION

Petitioners filed a three count petition in the Court of Claims in June, 1979, for just compensation. The United States, respondent, answered the petition and filed a counterclaim for rent and filed a Motion for Summary

Judgment. Petitioners filed an opposition to the respondent's Motion for Summary Judgment and their own Motion for Partial Summary Judgment on the Issue of Liability (which was treated as a cross motion).

After hearing, the Court of Claims on February 24, 1982, ignoring all equitable considerations, misapplied the doctrine of collateral estoppel and granted the respondent's Motion in part on Count I as it related to the real property (ownership claim) and on Count III (the orderly termination claim) and denied all other Motions for Summary judgment leaving for trial Count I as to the taking of the petitioners' business and Count II as to the taking of the leasehold and the counterclaim.

Concerning the real property, the Court of Claims in its ruling ignored and failed to respond to the following:

(1) that during the state action, the state court lost jurisdiction to convey the property and to grant the remedy prayed;

(2) the equitable considerations as to why the doctrine of collateral estoppel should not be applied in this case;

(3) the language in the assignment to the petitioners from the record owner of its interest in the property and its warranties in that regard; and

(4) the intent of the parties that as a consequence of the Consent Decree and the assignment to the petitioners, all matters were not settled; but rather petitioners were vested with all interest in the property existing as of the time of the taking and that petitioners were free to seek just compensation therefor.

Concerning "orderly termination", the Court of Claims ignored the amendment to the first law and interpreted the "orderly termination" provisions of Pub. L. No. 93-444, *supra*, contrary to its clear meaning on its face and as

shown by subsequent legislation amending the law. The Court further ruled that the petitioners should have been treated as a concessionaire (the dissenting opinion also stating that the petitioners could remain at the Marina indefinitely), but nevertheless granted Summary Judgment against the petitioners on Count III, notwithstanding the fact that they had been and continue to be deprived of these rights.

On March 10, 1982, the petitioners timely filed a motion for rehearing on the petitioners' Motion for Summary Judgment, which the respondents opposed. The motion for rehearing was denied on April 2, 1982, without comment, as a consequence of which petitioners file this Petition for Writ of Certiorari to the United States Court of Claims.

REASONS FOR GRANTING THE WRIT

This case presents serious and novel questions involving 1) the payment of just compensation for property which is the subject of a legislative taking; 2) the propriety of the actions of NPS regarding petitioners' known interest in the property taken; 3) a conflict in decisions of the Court of Claims regarding the doctrine of collateral estoppel; and 4) the meaning and application of "orderly termination" as it affected the petitioners' business and as applied by NPS to a similar situation in a dissimilar fashion. The first issue is referred to in section I below, issues 2) and 3) are referred to in paragraph II below, and issue 4) is referred to in paragraph III below.

I. The Decision Of The Court Of Claims Below Denies The Petitioner Just Compensation Under A Federal Legislative Taking Pursuant To Pub. L. No. 93-444, 88 Stat. 1304 (1974), Required By The Fifth Amendment To The Constitution Of The United States.

Petitioners were the equitable owner of the Marina at the time that Pub. L. No. 93-444, *supra*, was enacted. Although federal law is determinative of what constitutes a taking, the meaning of property and who is an owner for purposes of the Fifth Amendment are normally determined under state law. *Johnson* v. *United States*, 479 F.2d 1383, 1390 (Ct.Cl.1973). Thus, the substantive law of Maryland controls the status of the petitioners with respect to the property at the time of the taking.

Upon the exercise of their option to purchase the Marina, petitioners became a vendee in an executory contract for the sale of realty. Under Maryland law pursuant to the doctrine of equitable conversion, a contract of this nature makes the vendee the equitable owner of the property and the vendor holds the bare legal title in trust for the vendee and as security for the payment of the purchase price. *Stebbins-Anderson Company, Inc.* v. *Bolton*, 208 Md. 183, 186, 117 A.2d 908, 910 (1955); *Kingsley* v. *Makay*, 253 Md. 24, 28, 251 A.2d 585, 587 (1969); *Bull* v. *Goldman*, 30 Md. App. 665, 353 A.2d 661 (1976). The claim of a vendee under an unrecorded contract of sale is superior even to that of a creditor who obtained a judgment against the vendor subsequent to the execution of the contract. In *Stebbins-Anderson* deciding this issue in favor of the contract vendee, the Court states:

> "[T]he effect of such a contract is to vest the equitable ownership of the property on the vendee, subject to the vendor's lien on the unpaid purchase money, and to leave only the legal title in the vendor pending the fulfillment of the contract and the formal con-

veyance of the estate . . . [This result] is an application of the familiar doctrine of equitable conversion." (*supra*, at 186, 117 A.2d at 910).

At the time of the federal taking, petitioners had a pending equity action for specific performance of their option to purchase (Equity No. D-8967). After considering the undisputed facts, the Judge in that case ruled as follows: 1) that the petitioners here had properly exercised their option to purchase the Marina, had substantially complied with all the terms of the lease agreement and were ready, willing and able to exercise the option to purchase; but 2) that the landlord never attempted to settle on the contract to purchase agreed between the parties; 3) that if the landlord had acted as it should have to convey the property, then the petitioners should have been the record title holder when the United States took the property on October 15, 1974; and 4) that as the property was now owned by the United States, he *could not order specific performance* of the option to purchase (emphasis added).

The United States Constitution, Amendment V states, in pertinent part: ". . . nor shall private property be taken for public use, without just compensation . . .". Thus, under the Fifth Amendment, property owners are entitled to just compensation for property taken by the United States under its power of eminent domain. *United States* v. *71.29 Acres of Land*, 376 F.Supp. 1221, 1225 (W.D.La. 1974); *United States* v. *544 Acres of Land*, 309 F.Supp. 46, 47 (E.D.Tenn. 1969).

An individual who has exercised an option to purchase real property at the time of a taking by eminent domain possesses a compensable interest. 29A *C.J.S.* "Eminent Domain" § 196 (1965), *Nichols on Eminent Domain*, 3rd ed., Vol. 2 § 5.21(1). Additionally, court decisions sup-

port this view. *Nixon* v. *Mars*, 190 F. 913, 915 (8th Cir. 1911); *Commonwealth, Department of Highway* v. *Devillez*, 400 S.W. 2d 520, 521 (Ky. 1966); *Cheatham* v. *Carter County, Tennessee*, 363 F.2d 582, 585 (6th Cir. 1966); *State Highway Commission* v. *Miller*, 155 N.W. 2d 780, 783 (S.D. 1968).

It is well established that one taking under eminent domain cannot escape its liability to a proper party in an eminent domain proceeding by making a voluntary payment to the wrong party. *Buggs* v. *Maryland Transportation Authority*, 21 Md. App. 622, 358 A. 2d 562 (1976); *United States* v. *Certain Parcels of Land*, 40 F. Supp. 436 (D. Md. 1941). In *Buggs* the Court said:

> "The law is that when a condemnor voluntarily pays to the wrong person, he does so at his peril . . ." *supra* at 637, 358 A. 2d., at 568.

Notwithstanding this clear line of well established precedents' NPS completely ignored the petitioners and made payment to the wrong party. Obviously such action is patently illegal and cannot be sanctioned by this Court.

Additionally, a condemnor cannot ignore property interests of which it has actual knowledge even though the chain of record title does not reveal those interests. *Cheatham* v. *Carter County, Tennessee*, *supra*, at 585. *Cheatham* presents a factual situation similar to the present one. In discussing the propriety of the defendant county's course of conduct in the state forum, the Sixth Circuit Court of Appeals stated:

> "[T]he Defendant relies on having brought in as a defendant in the condemnation action, only the Iron Company, the record title holder. It cannot be excused from naming as Defendants, the Plaintiffs who held a substantial interest in the land and whose interest under the assumed facts was known to the

> Defendant and its attorneys and agents. It chose, so to speak, to bury its head in the sand, ostrich-like, and ignore the real outstanding interest. The purpose of recording and registering deeds is to give the world constructive notice of the transfers. One is still chargeable with the actual notice which one has." *supra* at 585.

The Court of Claims has taken the same ostrich like approach to this case as exhibited by NPS in completely ignoring the rights of the petitioners and other lessees.

The issue is simple and need not be belabored. Well established precedent requires that petitioners be paid just compensation for the taking of their property.

The only appellate review available from the adverse decision of the Court of Claims is by this Court. There are pending claims still to be tried in the Court of Claims. However, the decision of the Court of Claims on this issue should be reviewed at this time for judicial economy and to avoid the necessity of two trials, injustice, and additional delay to the petitioners.

II. The Decision Of The Court Of Claims Conflicts With Another Decision Of The Same Court As To The Application Of The Doctrine Of Collateral Estoppel And Additionally Misapplies That Doctrine.

The Court of Claims erred in stating that the issue of the option had been fully litigated adversely to the petitioners in the state court equity action. The Court of Claims noted that the state court denied the petitioners prayer for specific performance. However, the Court has conspicuously overlooked the clear language in the Consent Decree in that regard, Appendix C, *infra*, at 27a. The pertinent paragraph states as follows:

> "ORDERED, that specific performance as prayed for by the Plaintiffs, YACHTS AMERICA, INC.,

> and THOMAS BRUCE WILSON, be, and the same is hereby denied *since it is no longer an available remedy* because the United States of America took title of the subject property from FORT WASHINGTON MARINA, INC., on the 15th day of October, 1974, by public law 93-444." (Emphasis supplied).

This most important determination by the state court clearly shows that the remedy of specific performance and the underlying issue of proper exercise of the option to purchase was *not* before the state court at the time the order was issued and that the claim was *not* dismissed with prejudice. Contrary to the Court of Claims holding, specific performance was an unavailable remedy as a consequence of the enactment of Pub. L. No. 93-444, *supra*. Since the state court determined a remedy of specific performance was not available, it never reached the question of the petitioners' valid exercise of the option as that determination was not essential to the judgment entered in the case. See *Red Lake Band et al.* v. *United States*, 607 F.2d 930, 934 (1979).

The language of the Consent Decree provides in pertinent part as follows:

> "ORDERED, that all other claims, counts, counter-claims, and/or all other issues of any nature whatsoever, be, and the same are hereby dismissed with prejudice." App. C, *infra*, at 28a.

However, this language does not refer to, *inter alia*, the remedy of specific performance which was no longer available or to the underlying facts thereof. The key word is "other," referring to any other matters which may exist between the parties, but not the preceding matters (specific performance).

The fact that a cause of action was denied because the remedy was not available does not mean that the underly-

ing facts required to support that cause of action were found adversely to either party. Therefore, it is not a reasonable conclusion, as the Court of Claims improperly held, that such language as "all other issues . . . be . . . dismissed with prejudice" applies to the underlying facts of a cause of action previously denied for other reasons.

The Court of Claims has incorrectly stated that the interlocutory decree was not incorporated into the Consent Decree. The Court failed to note that the interlocutory Opinion and Order states:

> "In the Equity case, since the United States now owns the property, it is impossible for the Marina to specifically perform." App. E., *infra*, at 35a. and App. F, *infra*, at 37a.

The Consent Decree states:

> "specific performance . . . is hereby denied since it is no longer available because the United States of America took title to the subject property." App. C, *infra* at 27a.

The text in the Opinion and Order and in the Consent Decree is essentially the same. To fail to read these two documents together is to ignore the clear intent of the state court and of the parties because the rationale of the Consent Decree with regard to specific performance can only come from the interlocutory order.

Collateral estoppel has never been applied against a party prevailing in the first Court or against whom an issue was not found adversely to that party. *Yates et al.* v. *United States*, 354 U.S. 298, 336 (1957).

In the instant case it is the petitioners' contention that they prevailed below based upon the interlocutory order. However, assuming, *arguendo*, that the interlocutory order should not be considered, it is clear from the Con-

sent Decree that the issue of specific performance and the subsidiary issue of whether or not the petitioners properly exercised their option to purchase property were not decided adversely to the petitioners based upon the facts or otherwise.

As the state court had no jurisdiction to convey the property to the petitioners, *the petitioners had no incentive to litigate fully the underlying issue of the exercise of their option* as they might have litigated the same if they had known that the Consent Decree and the Mutual Release and Assignment might later be used by a third party, the United States, to deny the petitioners just compensation in an eminent domain case. See *Sorenson* v. *Raymond*, 532 F.2d, 496, 499 (1976); *Red Lake Band et al.* v. *United States. supra*, 932, 933.

Given the circumstances in this case, after the enactment of Pub. L. No. 93-444, *supra*, the Court of Claims was the only court in which title to the land could be tried.

> "As a general rule an issue is not 'actually litigated' for purposes of collateral estoppel unless the parties to a stipulation manifest an intent to be bound in a subsequent action. Moreover, an intention to be bound should not be readily inferred." *Red Lake Band et al.* v. *United States. supra*, 934.

The Court of Claims in its decision recites portions of text from the Mutual Release and Assignment (App. B, *infra*, at 14a and at 19a), but omits and fails to consider a critical part of that document. In particular, the Court of Claims has omitted the last three paragraphs on the third and final page of the Mutual Release and Assignment. The last two paragraphs are dispositive of the issue of intent in this case.

> *"FORT WASHINGTON MARINA, INC., expressly agrees to assign and hereby does assign to*

YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, any and all interest that it may have presently in the property known as FORT WASHINGTON MARINA, located within the confines of Prince George's County, Maryland, and consisting of approximately 8.3 acres of real property.

"Additionally, the parties believe and *FORT WASHINGTON MARINA, INC., warrants that as of October 14, 1974, FORT WASHINGTON MARINA, INC., held title to the subject property*, encumbered by two mortgages and that other than the interest that it lost in the aforementioned real property under the taking by the United States of America on October 15, 1974, by public law number 93-444, *it has not subsequently divested itself of any other interest in the subject real property.*: (emphasis supplied) App. D, *infra*, at 31a.

This language clearly shows the intent of the parties that petitioners reserve to themselves any rights the landlord may have had at the time of the government taking for just compensation and that the landlord had no further rights. Just as clearly the petitioners did not waive their rights against the United States and did not intend to resolve all issues once and for all.

The language in both the Consent Decree and the Mutual Release and Assignment stating that all other matters are dismissed with prejudice does not cover that which was assigned. That assignment was made because the petitioners prevailed in the court below on the facts and were entitled to just compensation, and therefore the record owner, the landlord, assigned any right it had to any proceeds to the petitioners.

It is clear that the petitioners have never manifested any intent to waive any rights they had against the United States.

* * *

The Court of Claims in the case of *Red Lake Band et al.* v. *United States, supra,* at 934, states that in certain circumstances equitable considerations dictate that the doctrine of collateral estoppel should not be applied and require the relitigation of issues. Other courts have also ruled that the doctrine of collateral estoppel should not be applied where it will work an injustice. *Roper* v. *Mabry,* 15 Wash. App. 819, 551 P. 2d 1381, 1384 (1976). The petitioner raised the issue of *equitable considerations* by factual allegations supported by affidavits and depositions and in its brief and argument before the Court of Claims which demonstrated that NPS consistently ignored the petitioners contrary to the intent of the law and its own regulations. Nevertheless, the Court of Claims omitted and failed to take into consideration the equitable aspects of the doctrine of collateral estoppel in its opinion in this case. If the Court of Claims had considered the equities involved it would not have applied the doctrine of collateral estoppel in this case.

The foregoing considered, the ruling of the Court of Claims is in conflict with its own ruling in *Red Lake Band et al.* v. *United States, supra,* and this Court should take jurisdiction of this case to resolve that conflict.

III. In This Case Of First Impression, Pub. L. No. 93-444, 88 Stat. 1304 (1974), Requires Interpretation By This Court Of Questions Of Procedures For Payment Of Just Compensation And For "Orderly Termination".

As amply demonstrated by depositions and affidavits below the petitioners and other lessees were denied just compensation for property taken and were denied their right to an "orderly termination" resulting in significant losses to each of them.

Because of the unique language of Pub. L. No. 93-444, *supra,* requiring, "just compensation to the owner of any

property taken," the United States systematically ignored the rights of petitioners who were not the owner of record and of numerous lessees on the property all of whom should have been included under the category of "owners".

Only the petitioners brought a claim. With the passage of time the other lessees have forever lost their rights. This loss was a direct consequence of the action and inaction of NPS in violation of the clear intent of Pub. L. No. 93-444, *supra*, that the United States *initiate the acts required* to see that private property would not be taken without just compensation. This issue was raised in petitioners' motion for summary judgment but was conspicuously not dealt with by the Court of Claims. By granting the writ of certiorari this Court can insure that just compensation is paid in future similar situations of legislative taking.

Pub. L. No. 93-444, *supra*, provided that the petitioner have an "orderly termination" of operations. This provision of the law has been applied by NPS using two different standards, one for the operation of Marshall Hall and a lesser standard for the petitioner, the operator of the Marina. It is axiomatic that similar situations can not be treated in dissimilar fashions. Yet that is exactly what was done in this case with no reason or logic.

By Pub. L. No. 94-578, *supra*, the Marina was deleted from the "orderly termination" provision of the first law. The Court of Claims, however, ruled that the Marina *was never included* in Pub. L. No. 93-444, *supra*, with regard to "orderly termination", thereby ignoring the clear language of the law and of the subsequent amendment. The Court of Claims further ruled that the petitioners should have been treated as a concessionnaire and could remain on the premises indefinitely.

The United States, in its Opposition to the petitioners' Motion for Rehearing, takes the position that the petitioners' right to remain at the Marina is permissive only and that these laws did not create a right in the petitioners to a concessionnaires' contract. This position conflicts with the decision of the Court of Claims.

The conflicts between the statutes, the decision of the Court of Claims, the prior inconsistent actions of the United States, and the present position of the United States should be resolved by this Court in order to reconcile these disparate positions and avoid further litigation on these issues.

CONCLUSION

For these reasons a writ of certiorari should issue to review the Opinion and Order of the Court of Claims.

Respectfully Submitted,

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June 28, 1982

APPENDIX

APPENDIX A

(1)

LAND PRESERVATION—MARYLAND

PUBLIC LAW 93-444; 88 STAT. 1304

[H. R. 4861]

An Act to amend the Act of October 4, 1961, providing for the preservation and protection of certain lands known as Piscataway Park in Prince Georges and Charles Counties, Maryland, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The Act of October 4, 1961 (75 Stat. 780), providing for the preservation and protection of certain lands in Prince Georges and Charles Counties, Maryland, as amended, is amended as follows:

(a) In section 2(b), amend the first sentence by striking out "drawing entitled 'Piscataway Park,' numbered NCR 69.714-18, and dated January 25, 1966," and inserting in lieu thereof "drawing entitled 'Piscataway Park,' numbered PIS-P-90,000, and dated July 19, 1974."

(b) In section 2(b), delete the words "The property herein described is more particularly depicted on the drawing numbered 1961-1, a copy of which is on file with the Secretary of the Interior.".

(c) In section 2(c), delete the first sentence and insert in lieu thereof the following: "Effective on the date of enactment of this Act, there is hereby vested in the United States all right, title and interest in, and the right to immediate possession of, all real property within the boundaries of the parcels designated A, B, C, and D, as shown on the drawing referenced in subsection 2(b). The United States will pay just compensation to the owners of any property taken pursuant to this subsection and the full faith and credit of the United States is hereby pledged to the payment of any judgment so entered against the United States. Payment shall be made by the

Secretary of the Treasury from moneys available and appropriated from the Land and Water Conservation Fund, subject to the appropriation limitation contained in section 4 of this Act, upon certification to him by the Secretary of the Interior of the agreed negotiated value of such property or the valuation of the property awarded by judgment, including interest at the rate of six (6) per centum per annum from the date of taking to the date of payment therefor. In the absence of a negotiated settlement or an action by the owner within one year after the date of enactment of this Act, the Secretary may initiate proceedings at any time seeking a determination of just compensation in a court of competent jurisdiction. The Secretary shall allow for the orderly termination of all operations on real property acquired by the United States in parcels A, B, C, and D of this subsection, and for the removal of equipment, facilities, and personal property therefrom: *Provided*, That in no event shall the Secretary allow operations at the Marshall Hall Amusement Park to continue beyond January 1, 1980. The Secretary shall, on lands acquired for the purposes of this park, implement a development plan which will assure public access to, and public use and enjoyment of, such lands. To further the preservation objective of this Act, the Secretary of the Interior may accept donations of scenic easements in the land within the area designated as 'Scenic Protection Area' on the drawing referred to in subsection (b) of this section."

(d) In section 4, delete "$5,657,000" and insert "$10,557,000". Approved Oct. 15, 1974.

(2)

NATURAL PARK SYSTEM—APPROPRIATION LIMITATIONS

An Act to provide for increases in appropriation ceilings and boundary changes in certain units of the National Park System, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

TITLE III—MISCELLANEOUS PROVISIONS

* * *

Sec. 305. Section 2(c) of the Act of October 4, 1961 (75 Stat. 780), providing for the preservation and protection of certain lands in Prince Georges and Charles Counties, Maryland, as amended (88 Stat. 1304), is further amended by changing the fifth sentence by deleting "parcels, A, B, C, and D" and inserting in lieu thereof "parcels A, B, and C".

* * *

(3)

A PROCEDURAL GUIDE

FOR THE

ACQUISITION OF REAL PROPERTY BY GOVERNMENTAL AGENCIES

DEPARTMENT OF JUSTICE
LAND AND NATURAL RESOURCES DIVISION
1972

* * *

I

INITIAL STEPS TO BE TAKEN BY THE ACQUIRING AGENCY PRIOR TO ACQUISITION OF THE LAND

* * *

B. PROCUREMENT OF TITLE EVIDENCE

* * *

4. *Curative Data and Other Pertinent Information Not Disclosed by a Title Certificate or Abstract.*

a. The acquiring agency should obtain and furnish as specified hereinafter:

(1) Full information concerning owners, including information as to minors, incompetents, persons in possession,[6] adverse claims encountered, and any other information usually not included in title certificates, but which has a bearing on who must be made parties to a condemnation suit. . . .

II

ACQUISITION BY DIRECT PURCHASE

* * *

C. CLOSING A DIRECT PURCHASE ACQUISITION

* * *

3. Action required for closing by either the Department of Justice or agency attorney:

a. Inspection of Property Immediately Prior to the Closing:

(1) Immediately prior to the closing of the purchase, the premises being acquired should be inspected by either the closing attorney, his assistant, or an authorized employee of the acquiring agency, for the purpose of ascertaining the rights or claims of persons in possession, and any unrecorded mechanics' liens for work or labor performed or material furnished within the statutory period. The result of this inspection should be evidenced by the execution of the Certificate of Inspection and Possession (form 4, appendix B, *infra*, p. 50).

(2) If any person is found in possession, his rights in the property should be determined and a duly executed disclaimer (form 5, appendix B, *infra*, p. 50), should be obtained.

* * *

(4) If the inspection discloses any other questionable objection or outstanding right, such question or right must be eliminated or the matter should be reported to the Land and Natural Resources Division before the delivery of the check.

* * *

e. Preparation and Execution of Deed to the United States:

When all objections to the title and all requirements noted in the preliminary title opinion have been satisfied, and any subsequently discovered adverse claim has been disposed of, the deed of conveyance to the United States prepared in compliance with the requirements set out in "Standards for the Preparation of Title Evidence in Land Acquisitions by the United States" prepared by the Land and Natural Resources Division should be executed . . .

Appendix B

Form 5

DISCLAIMER

State of _____, ss.
County of _____,

We (I) _____ (wife) (husband), being first duly sworn, depose and say (deposes and says) that we are (I am) occupying all (a part) of the land (proposed to be) acquired by the United States of America from _____, described as _____ acres, Tract No. _____, lying in _____ County, State of _____, and do hereby aver that we are (I am) occupying said land as the tenants (tenant) of _____; that we (I) claim no right, title, lien or interest in and to the above-described premises or any part thereof by reason of said tenancy or otherwise and will vacate said premises upon demand for the possession of said lands by the United States of America.

We (I) further agree that this disclaimer may be presented to any court having jurisdiction over condemnation proceedings relating to the above-described property, and such court is authorized to enter an order dismissing the undersigned from said cause without compensation and without adjudication of costs against the undersigned.

Dated this _____ day of _____, 19____.

_____
(Tenant)

_____
(Spouse)

Witnesses:

_____

_____

(4)

United States Department of the Interior

NATIONAL PARK SERVICE
WASHINGTON, D.C. 20240

FEB 15, 1980

IN REPLY REFER TO:

L1425(640)

Memorandum

To: All Regional Directors

From: Associate Director

Subject: "Consent to Offer to Sell Real Property" Agreement

It has been prescribed procedure that if some one other than the record owner is in possession of a tract being acquired by the Service that his rights be ascertained and that a disclaimer be obtained. (See Section 2.3 of the Land Acquisition Procedures.) Recently, however, the need has been perceived to institute a more systematic procedure in every situation in which another party has or claims an interest, whether or not of record, that is or may be adverse to that of the record owner. In addition to ordinary lease situations, those involving occupancy or possible adverse possession, those involving the contract seller/contract purchaser relationship, those involving rights of first refusal to purchase, and those involving leases with options to purchase are instances when account needs to be taken of interests possibly adverse to those of the record owner.

A lessee, particularly one with a long term lease, may well have a definite legal interest in the tract being acquired, fully as deserving of consideration by the Service as the record owner. The other situations mentioned above also involve parties who may have rights that need to be accounted for in the acquisition process. Though these situations do not occur frequently, they can be very troublesome when they do. Furthermore, experience has proved that the normal acquisition and title approval process does not always sufficiently safeguard the interests of the Service.

In order to deal with the problem, we have devised and hereby prescribe for use, in appropriate circumstances, a form entitled "Consent to Offer to Sell Real Property". It is modeled, with changes, on a form of similar name used by the Corps of Engineers. This form should be used in the situations discussed above and in any other situation when there is any reason at all to believe that a party other than a record owner may have or may claim any interest in the tract being acquired. Any doubts as to whether the form should be utilized are to be resolved in favor of its use. If the necessary signatures cannot be obtained, then consideration should be given to having any questions resolved through the judicial process. The Land Acquisition Division of the Washington Office should be consulted in any questionable cases.

It should be understood that any consideration due the lessee or other claimant is to be deducted from the total consideration and is not an add-on.

The form and these instructions will be incorporated in the Land Acquisition Procedures at a later time. The form will be printed in 6 copy multi-colored snap-out carbon sets. In the meantime, reproduce as many of the enclosed copy as you need.

We plan to place the order for printing in March. Any changes in the form you wish to suggest should be forwarded to reach us by February 29, 1980.

/s/ Daniel J. Tobias, Jr.

Enclosure

APPENDIX B

In the United States Court of Claims

No. 239-79L

(Decided February 24, 1982)

YACHTS AMERICA, INC., and
THOMAS BRUCE WILSON
v. THE UNITED STATES

Stephen Leventhal, attorney of record, for plaintiffs. *Dorothy R. Burakreis*, with whom was *Assistant Attorney General Carol E. Dinkins*, for defendant. *Carolyn P. Osolinik* and *Thomas S. Jackson*, *Patricia D. Gurne*, and *Jackson, Campbell & Parkinson, P. C.*, of counsel.

Before COWEN, *Senior Judge*, NICHOLS and KASHIWA, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

KASHIWA, *Judge*, delivered the opinion of the court:

This case is before the court on defendant's motion for summary judgment and on plaintiffs' motion for partial summary judgment. After considering the parties' submissions and oral argument, we deny in part plaintiffs' motion for partial summary judgment, allow in part defendant's

motion for summary judgment, and remand the remainder of the case to a trial judge for further determination.

Plaintiffs are Yachts America, Inc. (Yachts) and Yachts' president, Thomas Wilson. In October 1972, Yachts leased some eight acres of marina property along the Potomac River in Maryland from Fort Washington Marina, Inc. (Fort Washington). The leasehold was for a two-year period beginning November 1, 1972, at a monthly rental of $6,000. The lease allowed Yachts an option, exercisable prior to July 31, 1974, to purchase the marina property. The lease contained no provision allocating condemnation proceeds but did specify the leasehold would terminate if Yachts, pursuant to a governmental taking, was required to surrender possession of the premises.

The relationship between Yachts and Fort Washington was far from harmonious. Ultimately, Yachts brought at least three actions against its landlord. One action for breach of the lease agreement was filed November 30, 1973, in the Circuit Court for Prince George's County, Maryland, as Legal Action No. 56019 (the first breach suit). The first breach suit originally alleged Fort Washington had violated the lease by requiring excessive fire insurance, failing to pay for certain sewer improvements, and encumbering the marina property. Ultimately, the first breach suit also alleged Fort Washington violated the lease by not selling the marina property to Yachts. A second breach suit identical to the first was subsequently filed as Legal Action No. 5665 in the Circuit Court for St. Mary's County, Maryland. The date of the second breach suit's filing is unclear from the record.

In a third suit, Prince George's County Circuit Court Equity Action No. D–8967, Yachts sought ownership of the marina property (referred to hereafter as the equity action or the equity litigation). The filing date of the equity action is also not set forth in this record. Equity Action No. D–8967 alleged that Yachts had properly exercised the purchase option, that Fort Washington had not performed, and that Yachts was entitled to have the property conveyed.

While these lawsuits were pending, the United States became owner of the marina property on October 15, 1974,

through Pub. L. No. 93-444, 88 Stat. 1304 (1974). In relevant part, Pub. L. No. 93-444, *supra*, provides:

> • • • "Effective on the date of enactment of this Act, there is hereby vested in the United States all right, title and interest in, and the right to immediate possession of, all real property within the boundaries of the parcels designated A, B, C, and D, as shown on the drawing referenced in subsection 2(b). The United States will pay just compensation to the owners of any property taken pursuant to this subsection and the full faith and credit of the United States is hereby pledged to the payment of any judgment so entered against the United States. Payment shall be made by the Secretary of the Treasury from moneys available and appropriated from the Land and Water Conservation Fund, subject to the appropriation limitation contained in section 4 of this Act, upon certification to him by the Secretary of the Interior of the agreed negotiated value of such property, or the valuation of the property awarded by judgment, including interest at the rate of six (6) per centum per annum from the date of taking to the date of payment therefor. In the absence of a negotiated settlement or an action by the owner within one year after the date of enactment of this Act, the Secretary may initiate proceedings at any time seeking a determination of just compensation in a court of competent jurisdiction. The Secretary shall allow for the orderly termination of all operations on real property acquired by the United States in parcels A, B, C, and D of this subsection, and for the removal of equipment, facilities, and personal property therefrom: *Provided*, That in no event shall the Secretary allow operations at the Marshall Hall Amusement Park to continue beyond January 1, 1980. The Secretary shall, on lands acquired for the purposes of this park, implement a development plan which will assure public access to, and public use and enjoyment of, such lands. To further the preservation objective of this Act, the Secretary of the Interior may accept donations of scenic easements in the land within the area designated as 'Scenic Protection Area' on the drawing referred to in subsection (b) of this section."
>
> • • • • •

The marina property was located within Parcel D and thus originally was subject to the orderly termination provision. Parcel D subsequently was exempted from that provision by section 305 of Pub. L. No. 94-578, 90 Stat. 2732 (1976). In June 1975, the United States and Fort Washington negotiated $750,000 as compensation for Parcel D. In recognition

of Yachts' then pending litigation and two mortgages of the property, the $750,000 was paid into escrow.

On October 8, 1975, Fort Washington and Yachts settled their disputes. In the settlement agreement, a mutual release, each party agreed in broad language to:

> * * * release and forever discharge each other mutually and reciprocally, from all claims, demands, and causes of action that they now have or that might subsequently accrue to them arising out of or connected with, directly or indirectly, the aforementioned [lease] agreements between the parties, including, but not limited to, all claims, actions, or issues as set forth in the litigation between the parties known as Law No. 56019, in the Circuit Court for Prince George's County, Maryland, Law No. 5665, in the Circuit Court for St. Mary's County, Maryland, and Equity No. D–8967, in the Circuit Court for Prince George's County, Maryland.

Fort Washington also agreed to allow a $300,000 judgment to be entered in favor of Yachts and against Fort Washington. A contemporaneous consent decree in the equity action entered the $300,000 judgment in favor of Yachts and against Fort Washington, denied Yachts specific performance, and dismissed with prejudice all other claims and issues in that litigation. In separate proceedings, Yachts' breach actions were voluntarily dismissed with prejudice. Shortly after the actions were settled, Fort Washington became insolvent.

In June 1976, Yachts brought suit in federal district court against the United States, Fort Washington, and the escrow agent holding the $750,000. Count I of that petition alleged Pub. L. No. 93–444, *supra*, was unconstitutional in scope and purpose, while Count II alternatively sought just compensation for Yachts' purported ownership of the marina property. Eventually, the United States was granted summary judgment as to Count I. Further, the district court held all claims by Yachts against Fort Washington barred by res judicata arising from the state court consent decree. Yachts then secured voluntary dismissals without prejudice as to its remaining district court claims. In the interim since the district court dismissals, the $750,000 held in escrow has apparently been disbursed to Fort Washington's creditors other than Yachts. Yachts' $300,000 judgment against Fort Washington remains unsatisfied.

The petition in this court was filed in June 1979 and alleges three broad causes of action for just compensation. For simplicity's sake, we refer to these as Count I, Count II, and Count III. In a counterclaim, defendant seeks rent for Yachts' occupancy of the marina property since the date of taking.

I.

Count I of the petition appears to state two claims for just compensation. One claim is that compensation is owed for Yachts' alleged equitable ownership of the marina property. We refer to this as the Count I ownership claim. The second claim in Count I is that regardless of the property's ownership, a compensable taking of Yachts' business has occurred. We refer to this as the Count I business claim.

The parties' efforts thus far have centered largely on whether the Count I ownership claim is barred by either res judicata or collateral estoppel. Indeed, the record and argument as to the Count I business claim are so scant that as to that claim, we must deny either party summary judgment and remand to a trial judge for further determination. As to the Count I ownership claim, we turn first to the Government's assertion of collateral estoppel.[1]

Under the Government's view, collateral estoppel now bars plaintiffs from relitigating an essential element of the Count I ownership claim, *viz.*, whether Yachts obtained equitable ownership through a July 1974 exercise of the purchase option. If plaintiffs are indeed unable to assert ownership, the Count I claim for a taking of that ownership will necessarily fail.

Collateral estoppel bars the relitigation of issues that have been adjudicted in a previous suit. *E.g., Commissioner* v. *Sunnen*, 333 U. S. 591, 597–598 (1948); *Berdick* v. *United States*, 222 Ct. Cl. 94, 101–104, 612 F. 2d 533, 537–538 (1979); *McGinty* v. *United States*, 151 Ct. Cl. 399, 403 (1960), *cert. denied*, 368 U. S. 867 (1961). At one time, collateral estoppel

[1] The United States was not a party to the breach suits or the equity action between Yachts and Fort Washington, nor was there a decision on the merits of Yachts' district court claim for just compensation. It thus appears the United States can claim res judicata only as a privy to Fort Washington in the equity litigation. In light of our conclusion, *infra*, that collateral estoppel precludes the Count I ownership claim, we expressly decline to reach the res judicata issue.

was limited by the mutuality doctrine to circumstances where both parties in the second suit were litigants in the first suit and thus mutually bound by the previous judgment. *See Triplett* v. *Lowell*, 297 U.S. 638, 642 (1936). In a line of cases beginning with *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971), the Supreme Court has rejected the requirement of mutuality. Other notable cases in the progression include *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322 (1979), and *Montana* v. *United States*, 440 U. S. 147 (1979).

In *Carter-Wallace, Inc.* v. *United States*, 204 Ct. Cl. 341, 496 F. 2d 535 (1974), we identified the considerations relevant when collateral estoppel is sought in post-*Blonder-Tongue* patent litigation. In *Carter-Wallace, supra*, we said:

> • • • The guidelines suggested by the Supreme Court [in *Blonder-Tongue*] require that once the defense of estoppel is raised by the accused infringer, the court must first consider whether the issue of invalidity common to each action is substantially identical and whether in the earlier suit the patentee had had a full and fair opportunity to litigate the issue of invalidity (402 U. S. at 333). This determination of fairness, said the Court, must be based on an examination of the patentee's incentive to litigate the prior action, his choice of forum, his ability to procure crucial evidence and witnesses for that trial, and other factors, for instance, if the issue is non-obviousness, whether the first court adhered to prior guidelines established by the Court in determining patent validity. It is significant that the Court placed the burden on the plaintiff-patentee to show that he did not have a full and fair opportunity to litigate. [204 Ct. Cl. at 348, 496 F. 2d at 538–539.]

Similar guidlines are now applicable to all litigation in this court. *See, e.g., Monterey Life Systems, Inc.* v. *United States*, 225 Ct. Cl. ___, ___, 635 F. 2d 821, 826–827 (1980). We thus need not consider whether the United States would meet the former mutuality requirement.

It is apparent that if collateral estoppel is present here, it can arise only as to issues determined by the consent decree in the equity action. The federal district court's decision that the taking Act was constitutional determined no issues relevant to the Count I ownership claim. Likewise, its decision that Yachts' claims against Fort Washington became res judicata in the equity action necessarily re-

solved no issue not determined by the equity action consent decree. We turn, therefore, to the equity litigation.

Yachts' bill of complaint in Equity Action No. D-8967 alleged it had entered a lease agreement with Fort Washington. The bill of complaint further alleged:

> 2. That this same Lease Agreement provided the plaintiff an option to purchase the said property pursuant to a Sales Agreement which was attached to the said Lease Agreement and is attached hereto, the terms of which are incorporated herein, and which is marked Exhibit 2.
>
> • • • • •
>
> 4. That the plaintiff, pursuant to the terms of the Lease Agreement exercised its option to purchase the said property by letter dated July 20, 1974, a copy of which is attached hereto, the terms of which are incorporated herein, and is marked Exhibit 5. The letter requested that the defendant select [a] Sales Agreement, Exhibit 2 or Exhibit 4, or a proper substitute therefore [sic] which he would execute, to execute that agreement, and return it to the plaintiff so that the plaintiff could arrange for settlement.
>
> 5. That the plaintiff has fully performed all things required by the Lease Agreement to execute his option but that the defendant has failed and refused to execute the Sales Agreement or to proceed to settlement and to convey the property in accordance with the terms of the Lease Agreement or Sales Contract.
>
> • • • • •

Based on those allegations, plaintiffs sought:

> 1. That the purchase option and the Lease Agreement be specifically enforced.
>
> 2. That the Lease Agreement be specifically enforced.
>
> 3. That the Sales Agreement properly attached to the Lease Agreement be specifically enforced.
>
> 4. That a trustee be appointed to convey said property to plaintiff.
>
> 5. That the defendant be required to finance the property in accordance with the terms of the Sales Agreement.
>
> 6. That the defendant, pursuant to Maryland Rules 370b4 and 372e be required to verify his answer to this petition.
>
> 7. That the plaintiff have such other and further relief as the case may require.

Plainly, whether Yachts properly exercised the purchase option was of critical importance to the equity litigation.

The October 8, 1975, consent decree which terminated the equity litigation entered a money judgment of $300,000 in Yachts' favor against Fort Washington, denied specific performance as no longer available, and further ordered:

> * * * that all other claims, counts, counter-claims, and/or all other issues of any nature whatsoever, be, and the same are hereby dismissed with prejudice; * * *.

Inasmuch as the consent decree does not hold specifically that Yachts properly exercised the purchase option, the "all other issues * * * be * * * dismissed with prejudice" language constitutes a final judgment *against* Yachts on that issue. Plaintiffs cannot seriously argue that this identical issue is not present in the Count I ownership claim. Without proper exercise of the purchase option, Yachts can claim no ownership of the property. Nor does Yachts seriously contend on this record that it lacked full and fair opportunity to litigage this critical issue. Under the criteria we set out in *Carter-Wallace, supra*, it would appear plaintiffs in the present litigation should be collaterally estopped from asserting proper exercise of the purchase option.

This result is not altered by the fact that this decree was entered on the parties' consent. In *Green* v. *Ancora-Citronelle Corp.*, 577 F. 2d 1380 (9th Cir. 1978), the court addressed this very contention, holding:

> There is no question here that the prior state court judgment was a final judgment on the merits of the issues raised in that action. The fact that this judgment was the result of the parties' stipulation of settlement does not detract from its being considered a conclusive determination of the merits of that action for purposes of collateral estoppel where, as here, it is clear that the parties intended the stipulation of settlement and judgment entered thereon to adjudicate once and for all the issues raised in that action. 1B Moore's Federal Practice ¶ 0.444[1] (2d ed. 1974). [577 F. 2d at 1383.]

See generally Red Lake Band v. *United States*, 221 Ct. Cl. 325, 331–333, 607 F. 2d 930, 934 (1979); 1B Moore's Federal Practice ¶ 0.444[3], at 4009–4024 (2d ed. 1980).

We have already set out the broad language contained in the consent decree precluding further suit. Similar far-reaching, preclusive language is contained within the mutual release Yachts and Fort Washington executed:

MUTUAL RELEASE AND ASSIGNMENT

This Mutual Release * * * is intended to effect the extinguishment of any and all obligations, claims, demands, or issues whatsoever (including but not limited to) those [directly] arising out of * * * or indirectly resulting from a certain Lease Agreement entered into on October 30, 1972, by and between FORT WASHINGTON MARINA, INC., and YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, and all sales or other agreements attendant thereto whether written or oral.

Certain disputes and differences have arisen between the parties of the first part and the parties of the second part as a result of the aforementioned agreement or agreements, and the parties have agreed to execute this Mutual Release in settlement of such disputes and differences. In consideration of the mutual relinquishment of their respective legal rights with reference to these disputes and differences, in consideration of the execution of this Mutual Release, * * * each party, for himself, his heirs, successors, and legal representatives or assigns, expressly releases the other, his heirs, successors, and legal representatives or assigns, from any and all liability whatsoever for claims and/or demands of every nature whatsoever from the beginning of the world to the date first above written.

Additionally, and for the elements of consideration aforementioned, the parties of the first part and the parties of the second part for themselves and their heirs, legal representatives, and assigns, release and forever discharge each other mutually and reciprocally, from all claims, demands, and causes of action that they now have or that might subsequently accrue to them arising out of or connected with, directly or indirectly, the aforementioned agreements between the parties, including, but not limited to, all claims, actions, or issues as set forth in the litigation between the parties known as Law No. 56019, in the Circuit Court for Prince George's County, Maryland, Law No. 5665, in the Circuit Court for St. Mary's County, Maryland, and Equity No. D-8967, in the Circuit Court for Prince George's County, Maryland.

A Consent Decree has been entered into by and between the parties hereto and filed in the aforemen-

tioned proceedings, a copy of which is attached hereto and made a part hereof.

Read together, the consent decree and the mutual release demonstrate with clarity that the parties intended "to adjudicate once and for all the issues raised" in Equity Action D–3967. *Green* v. *Ancora-Citronelle, supra.*

Yachts' best argument against this result is that the consent decree constitutes an "implicit" holding that Yachts did exercise the option. If so, these plaintiffs might be entitled to use the decree offensively to establish ownership. *See Parklane Hosiery Co.* v. *Shore, supra,* 439 U. S. at 331. To support their view of the consent decree, plaintiffs point to an interlocutory ruling in the first breach suit, Prince George's County Circuit Court Legal Action No. 56019, that Yachts exercised the option.

That interlocutory ruling, however, simply was never incorporated, or even referred to, in the consent decree resolving the equity action. Interlocutory conclusions, of course, do not constitute final dispositions and neither res judicata or collateral estoppel arise from them. The cases so holding are legion. *E.g., Cromwell* v. *County of Sac,* 94 U. S. 351, 352–353 (1876); *Barrington Manor Apts. Corp.* v. *United States,* 183 Ct. Cl. 312, 320 n.4, 392 F. 2d 224, 228 n.4 (1968); *see* 1B Moore's Federal Practice, *supra* ¶ 0.409[1], at 1001–1012, and cases cited therein. Plaintiffs' suggestion that we read the interlocutory ruling into the final consent decree is tantamount to a suggestion that the interlocutory ruling itself be given collateral estoppel effect. Given the overwhelming authority against the latter proposition, the consent decree must be read as a final determination that Yachts did not properly exercise the purchase option. We so hold.

It follows that collateral estoppel now precludes plaintiffs from relitigating whether the option was properly exercised. Unable to assert equitable ownership of the property, plaintiffs' Count I ownership claim necessarily fails. To that extent, summary judgment in defendant's favor is appropriate on Count I of the petition. We thus need not consider whether res judicata also would preclude the Count I ownership claim. *See* note 1, *supra.*

Plaintiffs' Count II alleges just compensation is owed for a taking of Yachts' leasehold. Less clear is a related assertion in Count II that the United States must pay for certain improvements Yachts made during the tenancy.

Regarding the alleged taking of Yachts' leasehold, the parties agree Yachts continued in possession until the leasehold expired on November 1, 1974, some 17 days after Pub. L. No. 93–444, *supra*, was enacted. The parties appear to dispute, however, whether Government actions during these 17 days deprived Yachts of its leasehold notwithstanding Yachts' continuing possession. As with the Count I business claim, *supra*, we find the present record and argument too scant to decide this or the related claim of a compensable interest in several improvements to the premises. We therefore remand the Count II claims for further proceedings before a trial judge.

III.

Plaintiffs' final cause of action is that Pub. L. No. 93–444, *supra*, granted them a compensable right to terminate their marina business in an orderly manner. Plaintiffs continue that Pub. L. No. 94–578, *supra*, which subsequently exempted the marina property from the orderly termination provision, constitutes a taking of that supposed right for which compensation must be paid.

In relevant part, Pub. L. No. 93–444, *supra*, provides:

> • • • The Secretary shall allow for the orderly termination of all operations on real property acquired by the United States in parcels A, B, C, and D of this subsection, and for the removal of equipment, facilities, and personal property therefrom: *Provided*, That in no event shall the Secretary allow operations at the Marshall Hall Amusement Park to continue beyond January 1, 1980. • • •

Section 305 of Pub. L. No. 94–578, *supra*, provides:

> SEC. 305. Section 2(c) of the Act of October 4, 1961 (75 Stat. 780), providing for the preservation and protection of certain lands in Prince George's and Charles Counties, Maryland, as amended (88 Stat. 1304), is further amended by changing the fifth sentence by deleting "parcels A,

B, C, and D" and inserting in lieu thereof "parcels A, B, and C".

We assume *arguendo* that an allowance "for orderly termination," if granted, may be other than a revocable license to operate. We also assume *arguendo* that plaintiffs' Count III claim is not precluded by Yachts' continued possession and operation of the marina property after the enactment of Pub. L. No. 93–444, *supra*. Nevertheless, plaintiffs are not entitled to recover on the Count III claim.

After a careful review of these statutes and their legislative history, we are unable to accept plaintiffs' view that Pub. L. No. 93–444, *supra*, granted a "right" of orderly termination or that Pub. L. No. 94–578, *supra*, revoked such a "right." Particularly revealing are the Reports which accompanied H. R. 13713, which ultimately became Pub. L. No. 94–578, *supra*.

The Senate and the House Reports explain the section 305 exemption identically:

> PISCATAWAY PARK, MD.
>
> This change is a technical amendment to resolve a misunderstanding that has arisen from the Act in the 93rd Congress which authorized additions to the Piscataway Park. The National Park Service presently intends to terminate the operation of the marina. In reviewing the history of the legislation, it is apparent that there was no intent on the part of the Committee to force the closure of this facility. The concern of the Congress in this case is to protect the view from Mount Vernon. While an expansion of the marina, which would alter the appearance of this area, would not be acceptable, there is certainly no reason why the existing facility could not continue to provide a worthwhile service in the area. This amendment to the law is designed to permit the continued operation of the marina. Any measures, such as repainting with an unobtrusive color, which the National Park Service can take to reduce the prominence of the marina as viewed from Mount Vernon would be in keeping with the purposes of the Act. [S. Rep. No. 1158, 94th Cong., 2d Sess. 11–12 (1976); H. R. Rep. No. 1162, 94th Cong., 2d Sess. 6 (1976).]

The technical explanations in the Reports are even more concise:

> Section 305 is a clarifying amendment which provides that the Fort Washington Marina in Piscataway Park, Maryland, continue in operation. [S. Rep. No. 1158, *supra*, at 15; H. R. Rep. No. 1162, *supra*, at 8.]

That the Department of the Interior indeed viewed Pub. L. No. 93–444, *supra*, as *requiring* termination of the marina operation is confirmed by the Department's analysis of the changes section 305 of H. R. 13713 would make:

> *Piscataway Park, Maryland*
>
> Section 305 of the bill would specifically delete Parcel D (the Fort Washington Marina at Piscataway Park) from the phase out requirements of Public Law 93–444.
>
> It is the opinion of the Solicitor of this Department that the provisions of Public Law 93–444, enacted on October 15, 1974, provide that the operations at Fort Washington Marina should be terminated in an orderly manner. Accordingly, this Department had proposed to phase out the marina. In the House Report (No. 94–1162) the House Committee stated that there was no intent on the part of the Committee to force the closure of this facility in Public Law 93–444. This Department does not object to this subsection of the bill and it welcomes action by the Congress to clarify the status of the marina operation. [Letter from John Kyl, Assistant Secretary of the Department of the Interior, to the Honorable Henry M. Jackson, Chairman of the Senate Committee on Interior and Insular Affairs (July 23, 1976), *reprinted in* S. Rep. No. 1158, *supra*, at 22.]

The inescapable conclusion is not that Congress granted and then withdrew a "right" of orderly termination. Instead, it is that Congress made clear in Pub. L. No. 94–578, *supra*, that the Interior Department was under no duty by virtue of Pub. L. No. 93–444, *supra*, to terminate Yachts' existing marina operations. The implication, obviously, is that Yachts' existing operation was to be dealt with as would other concessions on National Park Service land. We hold that Pub. L. No. 93–444, *supra*, did not create, and Pub. L. No. 94–578, *supra*, did not revoke, a "right" in plaintiffs to orderly terminate the marina operation. Summary judgment in defendant's favor is appropriate on Count III of the petition.

IV.

Remaining for resolution is defendant's counterclaim for reasonable rent since the taking of the marina property. Yachts apparently continues to occupy the marina property. We have long recognized that one who occupies the premises of another does so, absent contrary agreement, with the implied obligation to pay a reasonable rental therefor. *See, e.g., Niagara Falls Bridge Commission* v. *United States*, 111 Ct. Cl. 338, 352, 76 F. Supp. 1018, 1019 (1948). Similarly, when a lessee holds over without new agreement after the expiration of his lease, the terms of the old lease agreement apply. *See Garrity* v. *United States*, 107 Ct. Cl. 92, 98, 67 F. Supp. 821, 822 (1946). As a defense to the counterclaim, plaintiffs allege, and portions of the record support, that Yachts had an agreement with the National Park Service to occupy the marina property rent free. Portions of the record, however, also support the Government's assertion that it has consistently demanded rent for periods after the enactment of Pub. L. No. 93–444, *supra*, and never entered a no-rent agreement with Yachts. Inasmuch as material facts are in dispute, summary judgment for either party as to the counterclaim is inappropriate. We therefore deny without prejudice defendant's motion for summary judgment and plaintiffs' motion for partial summary judgment as to the counterclaim. We remand the counterclaim to a trial judge for further determination.

CONCLUSION

Regarding the present petition's Count I ownership claim and Count III claim, we find no issue of material fact exists to preclude summary judgment. After fully considering the parties' submissions, we conclude summary judgment for defendant appropriate on those claims. To that extent, defendant's motion for summary judgment is hereby granted and plaintiffs' motion for partial summary judgment is hereby denied.

However, we conclude issues of material fact render summary judgment inappropriate on the present petition's Count I business claim and Count II claims, as well as

defendant's counterclaim. To that extent, defendant's motion for summary judgment and plaintiffs' motion for partial summary judgment are hereby denied without prejudice. The present petition's Count I business claim and Count II claims, as well as defendant's counterclaim, are hereby remanded to a trial judge for further proceedings consistent with this opinion.

NICHOLS, *Judge*, concurring and dissenting:

We must be grateful to Judge Kashiwa for clearing away the fog that surrounded this case, that is, most of it. I join in the opinion except where I indicate specific disagreement.

In view of the holding of the court that plaintiff did not effectively exercise its option and thus became equitable owner, plaintiff does not have a valid Count I claim for destruction of business. In the first place, it is undisputed that it was not destroyed. Congress was willing it should be continued at the same site, and plaintiff remained in possession, though ostensibly as a tenant at sufferance, until at least the filing of the petition in this court. Secondly, any interference with the business was compensable under the fifth amendment only indirectly, to the extent the land's adaptability to the business was an element to consider in the value of the land; not as a separate item. *Mitchell* v. *United States*, 267 U.S. 341 (1925). The neglect of the parties to tell us much about the business claim is easily explained: it rose or fell with the issue whether plaintiff had exercised its option and became the equitable owner of the real estate.

As the option was not exercised and the lease had only 17 days to run on the taking date, there is nothing left to litigate under Count II. In view of Clause 12 of the lease, entitled *Effect of Condemnation* the leasehold terminated as of the time possession had to be surrendered. If plaintiff did not have to surrender possession, nothing happened to terminate the leasehold and it continued to the end of the lease term. If plaintiff did have to surrender possession, Article 12 cuts off its recovery. Obviously Article 12 was intended to cut off the lessee from claiming a share of the award in case any taker by eminent domain exercised its

right to possession and thus interfered with the lease. Article 12 was a bargain that even if this occurred, the condemnation award would all go to the lessor. In either case, the cause of action under Count II depends on valid exercise of the option, just as Count I does, and Count II fails under the court's conclusion the same as Count I.

Count III is based on plaintiff's theory that Pub. L. No. 93-444 cut off the right to "orderly termination," *i.e.*, indefinite occupancy of the site by plaintiff. We have concluded that it was meant to permit plaintiff to occupy indefinitely. This disposes of Count III.

In my view, therefore, the only issues remaining for trial are those under defendant's counterclaim.

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APPENDIX C

Consent Decree of State Court-Equity Case—October 8, 1975

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

Equity No. D-8967

YACHTS AMERICA, INC., *et al*
Plaintiffs and Counter-Defendants

—VS—

FORT WASHINGTON MARINA, INC., *et al*
Defendants and Counter-Plaintiffs

CONSENT DECREE

Upon consideration of the pleadings filed herein, the consent of all parties and their respective counsel, it is, this 8th day of October, 1975, by the Circuit Court for Prince George's County, Maryland, sitting in Equity,

ORDERED, that a money judgment be, and the same is hereby entered in favor of the Plaintiffs, YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, against the corporate Defendant, FORT WASHINGTON MARINA, INC., only, in the amount of Three Hundred Thousand Dollars ($300,000.00); and it is further

ORDERED, that specific performance as prayed for by the Plaintiffs, YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, be, and the same is hereby denied since it is no longer an available remedy because the United States of America took title of the subject property from FORT WASHINGTON MARINA, INC., on the 15th day of October, 1974, by public law number 93-444; and it is further

ORDERED, that the sum of Six Thousand Dollars ($6,000.00) heretofore paid into the registry of this Court by YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, shall be paid over by the Clerk of this Court to YACHTS AMERICA, INC., and

THOMAS BRUCE WILSON, in the form of a Clerk's registry check to be issued forthwith; and it is further

ORDERED, that all other claims, counts, counter-claims, and/or all other issues of any nature whatsoever, be, and the same are hereby dismissed with prejudice; and it is further

ORDERED, that the remaining costs as taxed by the Clerk of this Court shall be equally divided between the parties Plaintiff and the parties Defendant, with YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, to pay the first Fifty Dollars ($50.00) thereof.

/s/ William H. McCullough
WILLIAM H. MCCULLOUGH, JUDGE,
Seventh Judicial Circuit of Maryland

APPENDIX D

MUTUAL RELEASE AND ASSIGNMENT

This Mutual Release, executed on the 8th day of October, 1975, by and between YACHTS AMERICA, INC., THOMAS BRUCE WILSON, all shareholders, officers, directors, and employees of YACHTS AMERICA, INC., all agents, attorneys, and accountants of YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, and their heirs, personal representatives, successors, and assigns, hereinafter referred to as the parties of the first part, and FORT WASHINGTON MARINA, INC., JOSEPH I. GOLDSTEIN, STAR ENTERPRISES, LTD., all shareholders, officers, directors, and employees of FORT WASHINGTON MARINA, INC., and STAR ENTERPRISES, LTD., all agents, attorneys, and accountants of FORT WASHINGTON MARINA, INC., JOSEPH I. GOLDSTEIN, and STAR ENTERPRISES, LTD., all other corporations or partnerships (including the officers, shareholders, directors, and partners thereof), of which JOSEPH I. GOLDSTEIN is either a shareholder, officer, director or employee, and their heirs, personal representatives, successors and assigns, hereinafter referred to as the parties of the second part, is intended to effect the extinguishment of any and all obligations, claims, demands, or issues whatsoever (including but not limited to) those arising out of directly or indirectly resulting from a certain Lease Agreement entered into on October 30, 1972, by and between FORT WASHINGTON MARINA, INC., and YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, and all sales or other agreements attendant thereto whether written or oral.

Certain disputes and differences have arisen between the parties of the first part and the parties of the second part as a result of the aforementioned agreement or agreements, and the parties have agreed to execute this Mutual Release in settlement of such disputes and differences. In consideration of the mutual relinquishment of their respective legal rights with reference to these disputes and differences, in consideration of the execution of this Mutual Release, and in consideration of the payment of Ten Dollars ($10.00) paid by the parties of the

first part to the parties of the second part, and in consideration of the payment of Ten Dollars ($10.00) by the parties of the second part to the parties of the first part, the receipts and sufficiency of which are hereby acknolwedged, each party, for himself, his hiers, successors, and legal representatives or assigns, expressly releases the other, his hiers, successors, and legal representatives or assigns, from any and all liability whatsoever for claims and/or demands of every nature whatsoever from the beginning of the world to the date first above written.

Additionally, and for the elements of consideration aforementioned, the parties of the first part and the parties of the second part for themselves and their heirs, legal representatives, and assigns, release and forever discharge each other mutually and reciprocally, from all claims, demands, and causes of action that they now have or that might subsequently accrue to them arising out of or connected with, directly or indirectly, the aforementioned agreements between the parties, including, but not limited to, all claims, actions, or issues as set forth in the litigation between the parties known as Law No. 56019, in the Circuit Court for Prince George's County, Maryland, Law No. 5665, in the Circuit Court for St. Mary's County, Maryland, and Equity No. D-8967, in the Circuit Court for Prince George's County, Maryland.

A Consent Decree has been entered into by and between the parties hereto and filed in the aforementioned proceedings, a copy of which is attached hereto and made a part hereof. It is expressly agreed between the parties that nothing contained herein shall abrogate the right of YACHTS AMERICA, INC., or THOMAS BRUCE WILSON, to lawfully execute upon the judgment entered in their behalf in Equity No. D-8967, in the Circuit Court for Prince George's County, Maryland, said judgment being specifically limited to FORT WASHINGTON MARINA, INC., or to make inquiry of, attach, garnish, or fi fa any assets of the Defendant therein, FORT WASHINGTON MARINA, INC., wherever they may be lawfully found. The parties understand that this Release is a compromise of doubtful and disputed claims,

and that this Release is not to be considered as an admission of liability on the part of any party hereto, and the parties hereto expressly deny any and all liability and intend merely to avoid litigation.

The parties also further agree that all remaining court costs in the aforementioned cases by and between the parties, shall be equally divided between the parties of the first part and the parties of the second part, however, YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, expressly agree to pay the first Fifty Dollars ($50.00) thereof.

FORT WASHINGTON MARINA, INC., expressly agrees to assign and hereby does assign to YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, any and all interest that it may have presently in the property known as FORT WASHINGTON MARINA, located within the confines of Prince George's County, Maryland, and consisting of approximately 8.3 acres of real property.

Additionally, the parties believe and FORT WASHINGTON MARINA, INC., warrants that as of October 14, 1974, FORT WASHINGTON MARINA, INC., held title to the subject property encumbered by two mortgages and that other than the interest that it lost in the aforementioned real property under the taking by the United States of America on October 15, 1974, by public law number 93-444, it has not subsequently divested itself of any other interest in the subject real property.

IN WITNESS WHEREOF, the parties execute this Release on the day and year first above written.

/s/ Stephen Leventhal, Witness
STEPHEN LEVENTHAL, WITNESS,

/s/ Thomas Bruce Wilson (SEAL)
THOMAS BRUCE WILSON

/s/ Victor A. Houlon, Witness
VICTOR A. HOULON, WITNESS

/s/ Joseph I. Goldstein (SEAL)
JOSEPH I. GOLDSTEIN

YACHTS AMERICA, INC.

/s/ By: Thomas B. Wilson (SEAL)
THOMAS B. WILSON
Duly Authorized Officer

FORT WASHINGTON MARINA, INC.

/s/ By: Joseph I. Goldstein (SEAL)
JOSEPH I. GOLDSTEIN
Duly Authorized Officer

STAR ENTERPRISES, LTD.

/s/ By: Joseph I. Goldstein (SEAL)
JOSEPH I. GOLDSTEIN
Duly Authorized Officer

APPENDIX E

Opinion and Order of State Court—Law Case

Interlocutory Order

September 18, 1975

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

Law No. 56,019

YACHTS AMERICA, INC., *et al*

Plaintiffs

—vs—

FORT WASHINGTON MARINA, INC.

Defendant

OPINION AND ORDER

Yachts America, Inc., hereinafter called Yachts (tenant) filed a motion for summary judgment against Fort Washington Marina, hereinafter called Marina (landlord), in Law No. 56,019. The motion for summary judgment refers solely to the Third Count of Yacht's Amended Declaration, which is a cause of action based on an alleged breach of a lease agreement by Marina and seeking damages for the alleged breach.

The undisputed facts in this matter, as disclosed by the pleadings, are that Yachts and Marina entered into a two-year lease for the Fort Washington Marina property as described in the pleadings. The term of the lease was from November 1, 1972 to November 1, 1974, at a rental of $6,000.00 per month. Attached to the lease was a sales agreement being incorporated by reference in the lease and identified as Exhibit B.

The lease itself by ¶ 17 gave the tenant an option to purchase the leased premises pursuant to the terms of the sales agreement, and described how the option was to be exercised. The

agreement also provided in ¶ 14 that Fort Washington could cancel the option by written notice in the event Yacht's default provided Yachts was given opportunity to cure the default.

Yachts properly exercised its option to purchase by letter dated July 20, 1974, directed to Mr. Joseph I. Goldstein, President of Fort Washington Marina from Thomas Bruce Wilson, President of Yachts America, Inc.

The parties reached an agreement concerning the value of the inventory referred to in ¶ 18 of the lease agreement as indicated by letter dated August 13, 1973, and attached to the Motion for Summary Judgment. This established the price of the inventory at $5,900.00.

All rents due under the lease agreement were paid by Yachts either directly to Marina or deposited in the registery of the court or paid as directed by the court. There is a dispute as to whether or not Yachts maintained satisfactory insurance on the premises, but this dispute is not critical in determining whether or not to grant a motion for summary judgment since Marina had not cancelled the option prior to its exercise. If Yachts did not keep satisfactory insurance causing Marina to pay some premiums, Marina may recover this as a set off to any judgment Yachts receives. This matter only goes to the issue of damages and not the material issue on this motion.

Marina, while now complaining that Yachts breached the lease in several instances, never notified Yachts or attempted to cancel the lease pursuant to ¶ 14 of the lease prior to Yacht's exercising its option to purchase. Not until August 26, 1974, which was one month after Yachts exercised the option to purchase, did Marina attempt to terminate the lease. This is indicated by a letter from Mr. Houlon to Yachts giving Yachts notice that it had failed to pay the August 1974 rent in full and returning the $1,000.00 check sent by Yachts to Marina for the August rent.

On October 15, 1974, the leased premises became the property of the United States Government by reason of legislative action. Interrogatory answers by Marina indicate that there

were two subsequent notices alleging breaches of the lease dated October 24, 1974 and November 1, 1974. However, these notices came after the ownership of the property transferred from Marina to the United States Government and one of the notices came after the expiration of the lease.

There are other disputes as to facts deemed not material by the Court concerning whether Yachts kept the premises in as good condition as received, whether there was any violation of the Prince George's County health regulations, and a question as to the amount of money paid by each party towards sewer repairs.

It appears to the Court that Yachts had substantially complied with all the terms of the lease agreement and was ready, willing and able to exercise the option to purchase, but that Marina never attempted to settle on the contract to purchase agreed to between the parties. It further appears that if Marina had acted as it should have when notified of Yacht's intention to exercise its option, settlement could have been made between the parties prior to the time that the United States Government, by legislation, acquired title to the property.

Accordingly, the Court finds that there is no dispute as to any material fact and that the plaintiff Yachts is entitled to a summary judgment in the law case as to the issue of liability. In the equity case, since the United States Government now owns the property, it is impossible for Marina to specifically perform. It would, therefore, seem that the only remaining issue between the parties in both cases would be the question of damages, if any, and this issue could be tried in the law case before a jury, as prayed for.

Upon consideration of the aforegoing, it is this 18th day of September, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that summary judgment be, and the same is hereby, granted to Yachts America, Inc. on the issue of liabil-

ity as to the Third Count of the Plaintiff's Amended Declaration.

/s/ William H. McCullough, Judge
WILLIAM H. MCCULLOUGH, JUDGE

APPENDIX F

Opinion and Order of State Court-Equity Case

September 18, 1975

(Applying Interlocutory Decree to Equity Case)

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

Equity No. D-8967

YACHTS AMERICA, INC., *et al*

Plaintiffs

—VS—

FORT WASHINGTON MARINA, INC.

Defendant

OPINION AND ORDER

Consistent with the Opinion and Order in Law No. 56,019 dated 18 September 1975 Plaintiffs' Motion for Summary Judgment as to the Issue of Liability on Plaintiffs' Verified Bill of Complaint is denied. Counsel are ordered to submit a memorandum of law prior to 30 September 1975 on the issue of the viability of this equity case in light of these developments. Defendant's Motion for Decision of Law Pursuant to Rule 502 (docket entry 59 in this equity case) is deferred pending the receipt of the memoranda.

/s/ William H. McCullough, Judge
WILLIAM H. MCCULLOUGH, JUDGE

Date: September 18, 1975

APPENDIX G

IN THE UNITED STATES COURT OF CLAIMS

April 2, 1982

ORDER

PER CURIAM: IT IS ORDERED that the motions of the parties as set forth, for rehearing, reconsideration or other relief under Rules 7(d), 151 and 152 are DENIED:

Appeal . . .

Yachts America, Inc. and Thomas Bruce Wilson Plaintiff's motion for rehearing filed March 10, 1982 of opinion dated February 24, 1982.

(COWEN, *Senior Judge*, NICHOLS & KASHIWA, *Judges*)

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